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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 347.

ALPHONSE EMSHEIMER

versus

CITY OF NEW ORLEANS.

On a Certificate, from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT AND APPELLEE.

This suit is one brought on a bill of complaint alleging the same to be a cause within the equity jurisdiction of the United States Courts. It is founded upon certain warrants for the payment of money, claimed to have been issued by the Board of Metropolitan Police by the act of the General Assembly of the State of Louisiana, No. 74, of the session of the year 1868; the present bill, except in so far as it attempts to show Federal jurisdiction based upon the diverse citizenship of the parties, is identically the same as that brought upon the same class of warrants

which was passed upon by this Court in the suit of *Benjamin vs. New Orleans,* reported in the 153 U. S., pages 429, 432, and by the U. S. Circuit Court, reported in 71 Federal Reporter 758, and by the U. S. Circuit Court of Appeals in the 74th Fed. Rep., 418.

The defendant herein demurred to the bill upon grounds of demurrer as follows:

1. That it does not appear upon the face of the bill any averment as to who were complainant's assignor or assignors, or their citizenship, at the date this suit was brought, and that for want of such allegation the Court was without jurisdiction.

2. That the complainants had not made the necessary parties parties to the bill, inasmuch as it appears from such bill that the Parishes of Jefferson and St. Bernard, together with the City of New Orleans, were required by the statutes of the General Assembly of the State of Louisiana to provide the means for promptly paying the amounts apportioned to them for maintaining and policing in the Metropolitan Police district; and that there were made by said parishes levies for taxes for their said respective apportionments; the said parishes and defendant had a mutual and common interest herein, which the said bill affects.

3. That the said bill does not state a cause entitling complainant to the relief prayed for; and,

4. That the bill did not disclose a cause within the equity jurisdiction of the Court.

The Court overruled the first ground of defendant's demurrer, and did not pass upon the second ground. The third and fourth grounds of the demurrer, as to whether there was equity jurisdiction shown in the bill, was maintained, and complainant's bill was dismissed. From the judgment overruling the first ground of demurrer to the jurisdiction of the court, defendant appealed to this court,

which subsequently dismissed the appeal. From the judgment maintaining the third and fourth grounds of demurrer, as to whether this was a cause in equity, the complainant appealed to the United States Circuit Court of Appeals for the Fifth Circuit; whereupon that court, desiring the instruction of this Honorable Court, certified the following questions and propositions of law arising on the record, to-wit: (1) This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship? (2) Under the facts stated in the bill and under the proper construction of Act No. 35 of the laws of Louisiana, approved March 31, 1877, can the City of New Orleans, as a legal successor of the defunct Metropolitan Police Board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late Board of Metropolitan Police for the amounts due on said certificates? (3) Under the facts stated in the bill, can the complainant maintain a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana against the City of New Orleans, for the establishment of a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid *pro rata* upon their claims?

ARGUMENT.

The allegations in the bill, by which complainant attempt to give the Federal Court jurisdiction, read as follows, to-wit: "That your orator is the holder and owner of certificates issued by said Board of Metropolitan Police in payment of its indebtedness for services rendered to it by the persons therein named, and of transfers of debts due by said Police Board amounting to three thousand and thirty ($3,030.48) and 48-100 dollars, a list whereof is hereto annexed as Exhibit "A" and made a

part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration and he is now the holder and owner thereof, and your orator avers that each of said persons in whose favor said claims accrued and to whom certificates were issued, or their heirs, or legal representatives, are citizens respectively of States other than Louisiana and competent as such citizens to maintain suit in this Honorable Court against said defendants for the enforcement of said indebtedness represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows, namely:" Then follows a list of the names and citizenship of the original payees of the warrants herein sued upon. There is no averment or allegation that any of the payees whose names are set forth in the bill are the assignors of complainant, and the bill fails to allege who the assignors of complainant were or where their citizenship.

Where a chose in action has passed from the original holder through the hands of third parties, averment of the diverse citizenship of the intermediate holders is necessary to maintain a suit in the Circuit Court of the United States.

In Metcalf vs. Watertown, 128 U. S. 586, plaintiff sued upon a judgment in favor of Wright, a citizen of Wisconsin, against the City of Watertown, a municipal corporation of that State. The plaintiff, Metcalf, did not acquire the judgment from Wright, but, as assignee of certain other persons who, under assignments from Wright, became severally owners of the judgment, it no way appeared in the record that plaintiff's assignors, who were not Wright, the original owner, but various parties to whom he assigned the judgment, were not citizens of the same State as the City of Watertown; it was held that the court was without jurisdiction.

The averment of the bill is "that one Lew Goldstein, as

holder of a large amount of Metropolitan Police warrants, issued to officers and members of the Metropolitan Police, and assignee of sundry creditors of said Board of Metropolitan Police, on the 21st of October, 1886, brought suit in the Twenty-sixth Judicial District Court in and for the Parish of Jefferson, Louisiana, against said City of New Orleans, said City of Kenner, and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said Board, similarly situated; * * * that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this Honorable Court, where holders of warrants and claims against said Board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, the claims *now held by your orator being among those so presented and proved.* * * * ''

It would thus appear, that since the warrants here sued upon were held by their original owners, they had passed into the hands of other parties, by whom they were presented and proved before a master appointed in the case of Lew Goldstein, referred to by the 11th paragraph of the bill; the citizenship of such holders is no where set out in the bill and since they were intervenors in the Goldstein case it is not at all clear that they were citizens of States other than Louisiana, since such appearance could be made by the citizens of Louisiana, holding claims similar to those sued upon by the complainant, Goldstein.

It is not disputed that Federal jurisdiction depends upon citizenship; a party whose citizenship is not set out in the pleading is presumed to be a citizen of the same State as the defendant.

United States National Bank vs. McNair, 56 Fed. Rep. 323.

It is further set out in the bill that "February 9, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this Honorable Court against said City of New Orleans, and others for account of the sums due by said defendants, applicable to the payment of the certificates and claims against said Police Board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin has acquired; * * * that among said claims sued upon by said Benjamin and said intervenors, were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described."

It thus again appears upon the face of the bill that intervening between the original holders of the warrant sued upon, and the complainant here, they were held by Benjamin and by the intervenors in Benjamin's suit, as to the citizenship of whom the bill is silent.

The parties to whom the warrants sued upon were originally issued by the Board of the Metropolitan Police, who are now claimed to possess the requisite citizenship to maintain this suit in the Circuit Court from the averments of the bill had evidently assigned the same to other parties before they reached the hands of the complainant; it is not sufficient to aver requisite citizenship in the original holders of these warrants to escape the statute which forbids the maintenance of a suit in the Federal Court of an assignee of a *chose in action*, upon which such a suit could not be maintained by the original holder; in point of fact, under the averments of the bill of complaint, is not the assignee of parties who were citizens of States other than Louisiana, but is the assignee of Goldstein or Benjamin or of the intervenors in their several cases, the citizenship of whom is not disclosed by the bill; it is the citizenship of these intervening assignees upon which depends

the jurisdiction in this case; the requisite citizenship of these does not appear upon the face of the bill.

Mollan vs. Torrance, 9 Wheat. 537; Turner vs. Bank of North America, 4 Dall. 8; Morgan vs. Gay, 19 Wallace, 81.

Is this a cause within the equity jurisprudence of the Court?

When the repealing act, No. 35 of 1877, was passed, the only effect it had was to abolish the Metropolitan Police Board and the Metropolitan Police and to permit the City of New Orleans to take into its own hands its police and to provide for its maintenance and to regulate same. The right to police belonged to the municipality, and it was merely as the agent of the city, the Board acted. When the Board was abolished the city resumed charge as principal. When the powers of the agent were revoked, the principal remained responsible for its acts and therefore the holders of the warrants could proceed against the City of New Orleans in an action at law just as they could have done against the Police Board had it not been abolished by Act 35 of 1877.

The bill of complainant in this suit is almost identical with the one filed by Benjamin in his suit against the city. The wording, with immaterial differences, is almost a reproduction of the Benjamin Bill, and the grounds of relief are exactly the same. Whatever could be said of the bill in the Benjamin case could equally be said here. We believe that the court, in passing on the Benjamin suit, demonstrated clearly and distinctly that it was not one of equity cognizance. But, as an evidence of how clear, English words can be tortured, so as to have their meaning interpreted in any way that suits one best, complainant has brought this suit as a cause in equity, and relies almost entirely for its support upon an isolated paragraph of the Court's opinion in the Benjamin suit. In the Benjamin case your Honors had before you as the main issue

whether or not the case was maintainable in the Circuit Court by reason of its subject matter—that is, whether or not the case stated was one which entitled complainant to relief under Section 10 of Article 1, and the 14th Amendment to the Constitution of the United States, but so interwoven was this with the other question, whether or not the suit was one of equity cognizance, that your Honors stated and discussed it at length and set forth the grounds upon which the equity jurisdiction was invoked, which were, principally, that by the repealing act of 1868 the Metropolitan Police Board no longer existed, and hence there was no defendant against whom a suit could be directed, but your Honors held, in substance, that this did not leave the complainant without remedy, as the public functions vested by the act of 1868 in the Board of Metropolitan Police, in consequence of its abolishing, fell upon the cities and parishes composing the Metropolitan Police District, and against these complainant's suit could be properly brought. But, to sustain the present bill as one in equity, complainant relies upon the following paragraph in your Honors' opinion as reported in the 153 U. S. on page 428, namely:

> "The jurisdiction in equity in this case is found in the inadequacy of the remedy at law *either* because the rights claimed could not be enforced at law, *or* because they could not be administered in that forum. The bill was manifestly framed to bring the case within that class of cases in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation. Broughton vs. Pensacola, 93 U. S., 266, 268; Merriwether vs. Garrett, 102 U. S. 472, 527."

Complainant's counsel have interpreted this paragraph to mean that the Benjamin case was such a one as would come under such description, but your Honors do not leave us in any doubt as to what you meant, and we

take the liberty of quoting at length from your opinion as reported at pages 428-9, immediately following the above quoted paragraph:

"Indeed it was expressly averred that the State courts had proceeded upon that principle in respect of similar warrants and certificates, and reference was made in terms to a decision of the Supreme Court of Louisiana in that behalf. Harrison vs. City of New Orleans, 40 La. Ann. 501. The contention was that the holders of these warrants had a right to bring an action at law against the Board of Police to recover thereon, and that the dissolution of the Board left the complainants without remedy except in a court of equity, judgment and execution at law not being required, because impossible, by reason of the dissolution of the Board. Therefore the court in chancery was appealed to, to lay hold of the assets of the Board as in the nature of a trust fund and apply them to the payments of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies and the taxes collected. These were the means provided by law for the payment of debts created by the Board, and if they were left unaffected by the repealing act, the alleged impairment had no basis to rest on. That act was essentially a mere change of the instrumentality of municipal government. It abolished the police organization established in 1868 and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the Board or to provide for the application of its assets to the payment of its debts, if existing laws were ample to effect that purpose. In that view the City of New Orleans remained for all purposes, so far as the creditors were concerned, the representative of the Board, and if the city were under a liability to pay the apportionments in cash, it was not absolved from that liability by the dissolution of the

Board. Although the creditors could not avail themselves of the instrumentality of the Board to sue for the apportionments (if that could ever have been done), still as those apportionments had all been made and taxes had been levied and in course of collection to pay them or so much thereof as was needed to pay the warrants and certificates, the act of 1877 left the City of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been."

On page 432 your Honors again emphasize what was clearly stated in the above quotation, in the following words:

"We have seen that the grounds of equitable cognizance relied on is that the holders of these warrants and certificates had the right to bring an action at law against the Board of Police to recover thereon, and that the dissolution of the Board left the complainants without remedy except in a court of equity, judgment and execution at law not being required, because impossible by reason of the dissolution of the Board. It is insisted that the city stands in the position of a debtor for taxes collected on Police Board apportionments and for the amounts of the apportionments themselves, so far as outstanding. If this was so and the Police Board was still in existence and liable to suit, then complainant would be obliged to recover judgment against the Board and proceed against the city by way of creditor's bill, to enforce the collection. Granting that this could be done without judgment after and because the Board had ceased to exist, nevertheless the claims of complainants must be established under the bill, precisely as they would have to be in an action at law, although it is ingeniously said that the suit is one to 'establish a fund,' this does not change the fact that it is a suit to recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund is, in this instance, only another name for the

ascertainment of an indebtedness of the city to the Board, available to the creditors of the Board after their claims as such are judicially determined."

In Benjamin vs. City of New Orleans, 71 Federal Reporter, 760, the Circuit Court declared of the bill in that case, which so far as concerned the grounds it set up, to show equity jurisdiction, is identical with the bill filed in the present case:

> "The grounds of equitable cognizance relied upon in this case were, after the citation of authorities, believed by complainant's counsel to be applicable, set out in the brief of complainant's counsel, filed in the Supreme Court, as follows: The destruction of the Board of Police by the repealing act deprived the creditors of their action at law against it for their enforcement of their demands, and left them without remedy except in a court of equity which will lay hold of its property and administer it for their benefit. Judgment at law and fruitless execution are not required because impossible in the absence of existing debtor. And it has been held by this court (the Supreme Court) that by the French jurisprudence which prevails in Louisiana, a creditor may exercise the right of action of his debtor, and that the right thus claimed for the creditor may very properly be pursued in a suit in equity, since it cannot be pursued in an action at law in the courts of the United States, and all existing rights in any State in the Union ought to be sueable in some form in those courts. City of New Orleans vs. Gaines, Admr., 131 U. S. 191-213; 9 Supreme Court, 745."

Following this the declaration of the Circuit Court, is that the Supreme Court distinctly declared the above to be the grounds of equity cognizance, and supports this declaration by quoting from the opinion of that court the language on page 428 *et seq.* in 153 U. S. Reports. This is fortified by other extracts of your Honors' opinion taken

from pages 432 and 435. After thus giving the most careful attention and consideration to the bill in the Benjamin case, as to whether or not it stated a cause in equity, the Circuit Court says, page 762:

> "The Supreme Court has clearly stated that the case was not a suit in equity arising under the Constitution of the United States. *It had clearly stated that the only grounds of equitable cognizance contended for were untenable.*"

The Circuit Court, in maintaining the city's demurrer in the present case, has said:

> "I have again carefully considered the opinion of the Supreme Court in New Orleans vs. Benjamin, 153 U. S. 411, and I am fully confirmed in my conviction that the Supreme Court has decided that that suit was not one of equity cognizance. It is perfectly plain to me that the complainant can bring a suit at law against the City of New Orleans, and that the abolition of the Police Board and the act of 1877 left the City of New Orleans to respond, as before, to the creditors * * * and the remedies to which they could resort were quite as efficient as they ever had been." "See specially page 429 of New Orleans vs. Benjamin in 153 U. S."

The only attempt complainants make to show a distinction in the bill in this case from the bill in the Benjamin suit, and as a further ground of equitable jurisdiction is in the averment that the defendant, as trustee, has collected large sums of money derived from taxes levied for the purpose of paying its indebtedness to the Board of Police which it has failed to pay over, but in violation of its duty as such trustee still holds, and which it ought to be required to account for.

Complainant will contend that this averment brings them within the decision rendered by this court in the suit of Fisher vs. City of New Orleans.

The claim involved in the Fisher case was for moneys actually collected. In this cause complainant is suing not only for an accounting for taxes collected by the city on levies for police purposes, but also prays that the city be condemned to pay, with interest, the uncollected levies and assessments of such taxes which had been apportioned to the city. Judgments at law were first obtained against the city in the Fisher case. In the present case no attempt has been made to do so. With this clear distinction between the two cases it is at once apparent that complainant does not present the same cause in equity as that set forth in the case of Fisher vs. City of New Orleans. 180 U. S. 185.

The warrants sued upon are mere orders for the payment of money drawn by one official of the Police Board upon another; they are drawn by the auditing officer upon the disbursing officer, and amount to nothing more than vouchers upon which the Treasurer may pay and by which a check may be put upon his doings, in this they do not represent obligations of the Board, but are simply directions for the payment of money for account of the Board. It is the settled jurisprudence of Louisiana that no action of any kind can be maintained upon such a warrant or certificate, or indebtedness, or other evidence of debt; they are not indebtedness, but mere vouchers upon which the Treasurer is authorized to pay an indebtedness. Flagg vs. Parish of St. Charles, 48 Ann. 766; Edwards vs. Parish of Bossier, 24 Ann. 457; Sterling vs. Parish of West Feliciana, 26 Ann. 59; and Flagg vs. Parish of St. Charles, 27 Ann. 319.

Respectfully submitted,

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